

STATE OF MAINE

SUPREME JUDICIAL COURT

DOCKET NO. Bar-97-5

BOARD OF OVERSEERS OF THE BAR)

v.)

J. HENRY LYONS, III)
Maine Bar #7263)

OPINION AND ORDER

Pending before the Court is an Information brought by the Board of Overseers of the Bar against J. Henry Lyons, Esq., Maine Bar #7263, seeking his disbarment for conduct "unworthy of an attorney" in violation of Maine Bar Rules 3.1(a) and 3.2(f)(2) following his conviction of two counts of gross sexual assault in violation of 17-A M.R.S.A. § 253 (1983 & Supp. 1997)¹ and

1. Section 253 of Title 17-A provides in pertinent part:

§ 253. Gross sexual assault

1. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

....
B. The other person, not the actor's spouse, has not in fact attained the age of 14 years.

....
2. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

....
H. The other person has not in fact attained the age of 18 years and the actor is a parent, stepparent, foster parent, guardian or other similar person responsible for the long-term care and welfare of that other person;

....

17-A M.R.S.A. § 253 (1983 & Supp. 1997).

Section 251 of Title 17-A defines the term "sexual act" as follows:

§ 251. Definitions and general provisions

....
C. "Sexual act" means:

(1) Any act between 2 persons involving direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other;

(2) Any act between a person and an animal being used by

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a sentence of fifteen years in the Department of Corrections with all but ten years suspended and six years of probation.² Also pending before the Court is Lyons's petition pursuant to Maine Bar Rule 7.3(g)³ that he be permitted to resign from the Bar notwithstanding the pending disciplinary proceeding. For the reasons hereinafter set forth, Lyons may resign from the Bar.

another person which act involves direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other; or

(3) Any act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.

A sexual act may be proved without allegation or proof of penetration.

17-A M.R.S.A. § 251(1)(C) (1983 & Supp. 1997).

2. See *State v. Lyons*, 1998 ME 225, 718 A.2d 1102.

3. Maine Bar Rule 7.3(g) provides:

(g) Resignations by Attorneys Under Disciplinary Investigation.

(1) An attorney who is the subject of an investigation under these rules may submit to the Board a letter of resignation, supported by an affidavit that:

(A) The resignation is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress and is fully aware of the implications of submitting the resignation;

(B) the attorney is aware that there is presently pending an investigation into allegations of misconduct, the nature of which allegations the attorney shall specifically set forth; and

(C) the attorney acknowledges that the material facts, or specified material portions of the, underlying the allegations are true.

(2) Upon receipt of such resignation, the Board shall file it, together with its recommendation thereon, with the Court, which after hearing shall enter such order as it deems appropriate.

(3) Any order accepting such resignation under this section shall be a matter of public record unless otherwise ordered by the Court; but the supporting affidavit required under the provisions of subsection (1) shall be impounded, whether or not such resignation is accepted, and shall not be made available for use in any other proceeding unless otherwise ordered by the Court.

Maine Bar Rule 7.3(g) entitled "Resignations by Attorneys Under Disciplinary Investigation" provides that an attorney tendering such a resignation must also tender an affidavit that attests that the attorney is both aware of the allegations of misconduct against him and that the allegations are true. This Lyons has done. Although the affidavit by rule and order is impounded, in this case that is academic. Lyons has been convicted of his crimes and is serving a lengthy jail sentence. The affidavit's function is to establish the allegations of misconduct should the former lawyer ever seek readmission to the Bar. The jury verdict here amply satisfies the Bar's need to memorialize Lyons's past conduct. But, in any event, he has signed the affidavit.

Following receipt of the Board's recommendation, which here was adverse to Lyons's request, the Court "after hearing shall enter such order as it deems appropriate." M. Bar R. 7.3(g)(2). The rule provides no guidance as to what factors or considerations the Court should consult in determining whether resignation or disbarment is "appropriate." We must therefore resort to first principles.

The Maine Bar Rules provide that the purpose of a proceeding brought against an attorney "is not punishment but protection of the public and the courts from attorneys who by their conduct have demonstrated that they are unable . . . to discharge properly their professional duties." M. Bar R. 2(a). Lyons committed a felony on a minor and a lawyer shall not "engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." M. Bar

R. 3.2(f)(2). Lyons's conduct reflects adversely on his "trustworthiness" and "fitness in other respects." Courts have disbarred or suspended attorneys for less. See *People v. Espe*, 967 P.2d 159 (Colo. 1998) and cases cited therein; *In the Matter of John R. Christie*, 574 A.2d 845 (Del. 1990). Lyons does not argue with the nature of his conduct nor with its reflection on his fitness to practice law.

Given the stated purpose of the Bar Rules, the fact that Lyons's misconduct did not arise in the course of his professional duties, and Lyons's acknowledgment that he is presently not fit to practice law, what function will be served by a disbarment rather than a resignation? We have said that lawyer discipline is not punishment. Presumably it should not be used to satisfy a profession's desire for vengeance. If protection of the public is the touchstone, either resignation or disbarment equally serves that end. If we are apprehensive that he may slide back into the profession without a fair consideration of his past conduct, his affidavit, his conviction, and this opinion stand guard against that. If we are attempting to impress the public with the Bar's vigilance in its prosecution of wrongdoers within the profession, another disbarment may help incrementally. But with Lyons no longer a lawyer, the public will be just as safe.

In 1986, the American Bar Association adopted the *ABA Standards for Imposing Lawyer Sanctions*. These standards were amended in 1992 and are "designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case." ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS at 01:802 (1992). In approaching any disciplinary

case, Standard 9.1 suggests that we look to any aggravating and/or mitigating factors which "may be considered in deciding what sanction to impose." ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 9.1 (1992).

Standard 9.22 lists aggravating factors as:

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution;
- (k) illegal conduct, including that involving the use of controlled substances.

ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 9.22(a) - (k) (1992).

Of the eleven possible aggravating factors, only two ((h) and (k)) could apply to Lyons. Even though Lyons exercised his constitutional right to a jury trial, he did not testify; he has never denied responsibility for his acts.

Standard 9.32 lists mitigating factors as:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability;
- (i) mental disability or chemical dependency including alcoholism or drug abuse when;

- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
- (2) the chemical dependency or mental disability caused the misconduct;
- (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
- (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses.

ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 9.32(a) - (m) (1992).

Of the thirteen possible mitigating factors, at least ten ((a), (b), (c), (d), (e), (g), (j), (k), (l), and (m)) apply to Lyons.

Standard 5.1 covers Lyons's misconduct, i.e., a "criminal act that reflects adversely on the lawyer's . . . fitness," and states that,

absent aggravating or mitigating circumstances . . . disbarment is generally appropriate when:

- (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 5.11(a) & (b) (1992).

Standard 5.1 goes on to state that "absent aggravating or mitigating circumstances" . . . when a lawyer engages in "criminal conduct which does not contain the elements listed in Standard 5.11 . . . suspension is generally

appropriate." ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 5.12 (1992). With the mitigating factors greatly outweighing the aggravating factors and with Lyons's misconduct not containing the elements listed in Standard 5.11, the ABA Standards would favor suspension of Lyons rather than his disbarment.

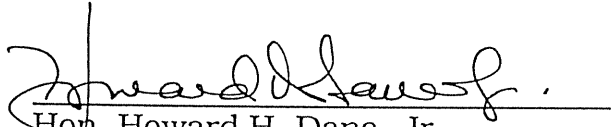
An attorney with no prior criminal or disciplinary record was permitted to resign in *The Florida Bar v. Sherry*, 445 So.2d 1021 (Fla. 1984). Attorneys were also permitted to resign rather than withstand disbarment in cases where the criminal conduct was unrelated to the attorneys' practice of law. See *Matter of Homer*, 345 S.E.2d 335 (Ga. 1986) (second-degree murder); *Jones v. Kentucky Bar Ass'n*, 708 S.W.2d 637 (Ky. 1986); *Matter of Mastropieri*, 459 N.Y.S.2d 849 (App. Div. 1983) (filing fraudulent income tax returns). Resignations were rejected and disbarment imposed when the misconduct involved an attorney's clients. See *Thomas Joseph Casey*, 13 Mass. Attorney Discipline Reports 75, (1997) (stealing client funds); *Office of Disciplinary Counsel v. Herrmann*, 381 A.2d 138 (Pa. 1977) (stealing client funds); *Matter of Ditri*, 364 A.2d 545 (N.J. 1976) (stealing client funds).

Because Lyons's conduct falls within the conduct described in Standard 5.12, allowing him to resign is the appropriate way to conclude this matter. His performance in representing his clients was excellent (see letter of Janet K. Kantz, Esq.); he has accepted responsibility for his criminal conduct (see sentencing transcript and his letter to the Court); he has been sentenced to a lengthy prison sentence; and he is currently active

and progressing in sex offender treatment while incarcerated (see letter of Maureen Carland Jordan, LCSW).

The request for resignation from the Bar submitted by J. Henry Lyons, III, dated December 3, 1998, is accepted and his name is now removed from the list of practitioners who are admitted to practice law before the Courts of the State of Maine. Pursuant to M. Bar R. 7.3(g)(3), the affidavit submitted by Lyons with his letter is hereby impounded and shall not be available for inspection unless otherwise ordered by the Court. His affidavit may, however, be made public and be used by the Board of Overseers of the Bar, the Board's Grievance Commission and bar counsel, in response to any reinstatement petition Lyons may later file.

Dated: October 25, 1999


Hon. Howard H. Dana, Jr.
Associate Justice